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Supreme Court of the United States

October Term, 1972

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF FOR RESPONDENTS

HERMAN SCHWARTZ,
EDWARD I. KOREN,
LEE MICHAELS,
New York Civil Liberties Union,
77 West Eagle Street,
Buffalo, New York 14202,
Attorneys for Respondent Michael Katzoff.

JACK GREENBERG,
STANLEY A. BASS,
Room 2030,
10 Columbus Circle,
New York, New York 10019.

RICHARD A. KOHN,
100 State Street,
Albany, New York 12207,
Attorneys for Respondents Eugene Rodrigues and John Kritsky,

MELVIN L. WULF,
American Civil Liberties Union Foundation,
22 East 40th Street,
New York, New York 10016.

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BRIEF FOR RESPONDENTS

Opinions and Orders Below

The *in banc* decision of the Court of Appeals is reported at 456 F. 2d 79 and is reproduced in the Appendix commencing at page 113a. The order to *in banc* is set forth in the Appendix at page 112a.

The decision of the panel which initially decided the *Rodriguez* case is reported at 451 F. 2d 730. It is re-

produced in the Appendix commencing at page 28a. The District Court opinion in *Rodrigues* is reported at 307 F. Supp. 627 and is included in the Appendix commencing at page 18a.

The opinion of the Second Circuit panel which initially decided the *Katzoff* case is reported at 441 F. 2d 558 and is included in the Appendix commencing at page 84a. The District Court opinion in *Katzoff* has not been officially reported. A copy is included in the Appendix commencing at page 62a.

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 and is reproduced in the Appendix commencing at page 104a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered on January 25, 1972. The petition for certiorari was filed on April 24, 1972. Certiorari was granted on June 19, 1972.

Question Presented

Should this Court repudiate its decisions in *Wilwording v. Swenson*, 404 U. S. 249 (1971), *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972) and other recent decisions, and deny state prisoners the right to challenge unconstitutional prison conditions under the Civil Rights Act, 42 U. S. C. § 1983?

Statement

Respondents accept the Statement in the brief for petitioners (hereafter "the State") as substantially correct, with two relatively minor exceptions set forth in the margin.[1]

Summary of Argument

Just last term, in *Wilwording v. Swenson*, 404 U. S. 249 (1971), and *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972), this Court reaffirmed the well-established principle that state prisoners can challenge prison conditions under 42 U. S. C. § 1983 without exhausting either state judicial or administrative remedies. In *Wilwording*, the Court said: "State prisoners are not held to any stricter standard of exhaustion than any other civil rights plaintiffs." 404 U. S. at 251-52. The State would have the Court repudiate that well-established principle and require all state prisoner challenges to prison conditions to be treated as habeas corpus petitions, which would be barred if state judicial

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[1] (1) The State asserts that Judge Feinberg believed there were "overwhelming numbers of 'frivolous prisoner petitions,'" and that "some fair way of dealing with the problem is called for." (Br. 13). (All references to the State's brief will be "Br.___.") In fact, however, Judge Feinberg said "*If* the already overburdened federal courts are being overwhelmed by frivolous prisoner petitions . . ." (App. 12a) (emphasis added).

(2) The State described the district court's opinion in *Rodrigues* as having "*specifically* turned on the failure of the Prison Commutation Board to . . . advise the Commissioner of Correction in writing of its reasons for disallowance of good behavior time." (Br. 7) (emphasis added). In fact, however, the district court found several specific defects in the disciplinary procedures, but relied on the "failure . . . to advise" as the "chief basis." (App. 26a). See also Waterman, J., dissenting (App. 34a-42a).

It may also be worth noting that the derogatory diary entries for which Katzoff was punished with 60 days in solitary confinement and 60 days loss of good time were "creep" and "cigar-smoking s. o. b." (App. 86a).

remedies had not been first exhausted; in addition, the State would also have state prisoners exhaust state administrative remedies as well.

These requirements are not only stricter than those imposed on other civil rights plaintiffs, but also stricter than those facing almost all other federal litigants. The State's contention is barred by *stare decisis*, as well as by the history and purpose of the exhaustion requirement and the policies of the Civil Rights Act. Furthermore, such exhaustion would not significantly reduce federal-state friction or the federal courts' burden, and would not benefit the state prisoner in the slightest. Instead, it might well eliminate all meaningful scrutiny of prison officials' actions.

1.a. It is clear from the history and policies of 28 U. S. C. § 2254 (b) that exhaustion is required in order to avoid friction between federal and state *courts*, not between federal courts and state administrative agencies, the only state actions that are at issue in prison conditions cases. Exhaustion is thus properly limited to collateral attacks on state court convictions and perhaps also to other direct conflicts with state court judgments.

b. It is for this reason that numerous prison conditions cases in this Court and elsewhere have been brought under § 1983 without even a challenge to the jurisdiction, and why all of the cases where that challenge has been made, have rejected it.

2. An exhaustion requirement would not reduce federal-state friction but, on the contrary, might increase it.

a. In the first place, prison-conditions suits are not "unique" in their potential for federal-state friction, but are very similar to other actions under § 1983 challenging state official action. Moreover, all challenges to state ac-

tion have special problems, but this Court has never accepted such an argument, even though persistently pressed in virtually every type of § 1983 suit, including a recent prison suit. *Houghton v. Shafer*, 392 U. S. 639 (1968).

Whatever special considerations might exist in prison-conditions cases are essentially *administrative*, and state courts are no better equipped to handle these cases than federal courts, as the long history of the "hands-off" doctrine in state courts indicates.

The fact that confinement results from a state court process of conviction and sentence is not significant. For one thing, that latter fact does not define a clearly delineated category. For example, does it include suits at the beginning of the criminal process, such as police abuse cases, see *Monroe v. Pape*, 365 U. S. 167 (1961)? Does it include actions after confinement, such as suits for damages after release, or against post-release disabilities? On the other hand, does it exclude conditions in pre-trial detention facilities? Does it exclude damages suits in general, especially where no damages remedy exists in state courts? Moreover, most state courts lose jurisdiction over prisoners after judgment, and, as the long history of the "hands-off" doctrine shows, retain virtually no interest.

b. Injecting state courts into the process may *increase* federal-state friction, for it will introduce single-judge federal review of state high-court decisions, whereas now the review is only of state administrative actions. The experience with habeas corpus indicates that friction results primarily from the former type of review, and despite the existence of an exhaustion requirement.

c. Limiting the State's claim to prisoner complaints for release from custody because of unconstitutional administrative action, as the State originally urged, produces irra-

tional differences, for it makes the availability of § 1983 depend on: (1) fortuities of timing, *i.e.*, whether the action is brought at a time when restoration of good time will result in immediate release under state law; (2) fortuities of punishment, *i.e.*, whether the suit is in response to a good time penalty, instead of being anticipatory, declaratory, for damages, or in response to other types of penalties, such as loss of privileges. Abstention is precluded because these cases do not usually raise state-law issues that might obviate consideration of the federal claim.

d. Exhaustion of administrative remedies is precluded by *Houghton v. Shafer*, 392 U. S. 639 (1968), and, in any event, is not raised by the facts of these cases.

3. Exhaustion cannot substantially reduce the federal courts' burden of frivolous or petty cases. For one thing, unsuccessful state challenges will wind up in the federal courts sooner or later. If damages actions are excluded from the exhaustion requirement, as the Court of Appeals below has held, then exhaustion will be easily avoided right at the start by simply adding a claim for damages, as so many prisoners already are doing. That an exhaustion requirement cannot reduce the federal court burden can be seen from the experience with habeas corpus, where the reduction came only after some of the applicable legal principles had developed.

It is also important to note that a significant number of prison conditions cases are meritorious, as the cases at bar and many others show. Thus, even the dissenters below would exempt certain "shocking" cases from exhaustion. The State's position would bar federal review of all cases until long after the fact; given current state court attitudes, this would effectively bar all meaningful judicial scrutiny, which is precisely what the State has sought not only in this case, but elsewhere.

4. Prisoners will not be better off with the State's position. Not only will they be denied a federal forum at a time that the facts are fresh, but they may lose it altogether by the passage of time or by *res judicata*, where damages are concerned. Moreover, they gain nothing from the habeas corpus remedy—it is not swifter or more flexible than § 1983 (apart from the delay in getting to federal court in the first place) and there are many uncertainties about its procedural attributes, such as the availability of class action or discovery.

ARGUMENT

I. The State's claim requires repudiation of a long and uniform series of decisions by this and virtually all other courts.

A. The State's claim is unprecedented in scope.

Just last year, in *Wilwording v. Swenson*, 404 U. S. 249 (1971), this Court declared:

> "Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' Monroe v. Pape, 365 U. S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473 (1961); McNeese v. Board of Education, 373 U. S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 U. S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). *State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.* Houghton v. Shafer, 392 U. S. 639, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the

> probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' Id. at 640." 404 U. S. at 251-52 (emphasis added).

Just a few months later, the Court reaffirmed this principle when it noted that "some or all of [a Wisconsin prisoner's challenges to his commitment to a "sex deviate facility"] may be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required. Wilwording v. Swenson, *supra*." *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972).

And in the same and past terms, this Court considered and disposed of numerous prison-condition cases under 42 U. S. C. § 1983, without requiring or even discussing exhaustion of prior state remedies. *E.g., Haines v. Kerner*, 404 U. S. 249 (1972); *Cruz v. Beto*, 405 U. S. 319 (1972); *Younger v. Gilmore*, 404 U. S. 15 (1971); *Cruz v. Hauck*, 404 U. S. 59 (1971); *McDonald v. Board of Elections*, 394 U. S. 802 (1969); *Lee v. Washington*, 390 U. S. 333 (1968); *Cooper v. Pate*, 378 U. S. 546 (1964).

Despite this clear language and uniform line of recent precedents, the State is explicitly asking this Court to hold that state prisoners do have lesser rights to a federal forum than other litigants under 42 U. S. C. § 1983 and, unlike other such litigants, must exhaust all state remedies before availing themselves of a federal forum. Surely, if *stare decisis* means anything, such a claim must be rejected.

1. ***The scope of the State's contention.***

It is important at the outset to delineate the full dimensions of the State's claim,[2] which can be seen from the following typical example: If a state prisoner wants to challenge physical brutality and to seek damages therefor, under the State's approach he must:

1. Exhaust administrative remedies (Br. 32-34).

2. If unsuccessful administratively, he must file in the state trial court and then participate in all the necessary appeals;

3. If unsuccessful after all the state administrative and court proceedings, he may then go into federal district court under 28 U. S. C. § 2241;

4. If he is successful in federal court and is entitled to damages, he must bring or join a separate action under 42 U. S. C. § 1983 since damages are not available in a habeas corpus action. Furthermore, even if there is no state damages remedy (as in New York), the State would still require the prisoner to go first into state court on the substantive merits. If his state suit is successful, he may then go into federal court under 42 U. S. C. § 1983 for his damages, (Br. 40), though apparently without filing a federal habeas petition. *But see, Ray v. Oswald*, ____ F. 2d ____, 72-1455 (2d Cir. 10/19/72); *Jones v. Decker*, 436 F. 2d 955 (5th Cir. 1970) (damage actions allowed in federal court without prior resort to state court).

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[2] Originally the State seems to have argued only that where a federal court decision would result in immediate release from custody, habeas corpus is the only appropriate remedy. Brief for Respondents-Appellants in *Katzoff* in Second Circuit, pp. 7-10. This was also the initial basis for decision in the Court of Appeals, see App. 31a (*Rodriguez*), 87a (*Katzoff*). On the *in banc* hearing, however. the State expanded this narrow position, and asked the Court to rule that *all* prisoner cases be treated as habeas corpus petitions.

2. *The rationale for the State's contention.*

The State asserts the following:

a. The words "in custody" in §§ 2241 and 2254(b), include not merely the fact or duration of custody, but also the manner and conditions thereof.

b. Such a reading is appropriate because:

(1) *Comity requires it.* Without exhaustion of the type requested, there will be federal-state friction over prison issues. "The concern for the role of the state courts in reviewing prisoner complaints has particular relevance because the claims asserted arise as a direct consequence of the process of state conviction and sentence." (Br. 28) Furthermore, prisons are unique in the pervasiveness of the supervision and the consequent possibility of numerous federal claims. State courts must be allowed a role in the development of the governing federal law (Br. 26); they are in a better position, geographically and otherwise, to determine these claims. (Br. 32)

The State seems also to assert that administrative remedies must also be exhausted to allow prison administrators the initial opportunity to see that any "new procedures are being properly and consistently implemented." (Br. 31)

(2) *The federal court burden.* Unless such exhaustion is required, the federal courts will be overburdened with numerous frivolous applications, which are multiplying many times. (Br. 35)

(3) *The prisoner is better off* with habeas corpus than with 42 U. S. C. § 1983 because the habeas corpus remedy is both more flexible and more expeditious (Br. 35-39). The possibility of losing a federal forum is not a valid consideration (Br. 42-45), and the state courts are providing adequate remedies, though the actual substantive results in such cases are not relevant (Br. 47).

The State's reading of the statute and its reasons for such a reading are not supportable. To confine prisoners' claims about conditions to habeas corpus and to single them out for exclusion from the rights and remedies afforded by § 1983 is to ignore the history and purposes of both statutes. Such a ruling would also create inconsistencies and incongruities in the processing of prisoners' complaints with few, if any, benefits.

B. The State's claim is barred by governing precedent and the purpose of the exhaustion requirement.

From a purely linguistic aspect, the words "in custody in violation of the constitution" in 28 U. S. C. §§ 2241 and 2254 probably could be stretched to accommodate the conditions of custody, as well as the fact and duration of that custody, though such a stretch would hardly be a "plain meaning" reading; a few courts have accepted habeas jurisdiction of complaints about prison conditions as the State rightly points out. See, *e.g.*, *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir. 1944); *Johnson v. Avery*, 252 F. Supp. 783 (M. D. Tenn. 1966); *rev'd on other grounds*, 382 F. 2d 353 (6th Cir. 1967); *rev'd*, 393 U. S. 483 (1969); *Wilwording v. Swenson*, *supra*.[8] It would do violence to both the nature of habeas corpus and the purpose of exhaustion, however, to introduce that requirement into remedies which do not threaten the values it is designed to protect.

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[8] Habeas corpus relief originally may have been made available because there was no other remedy for in-prison abuses before the resurrection of § 1983 in *Monroe v. Pape*, 365 U. S. 167 (1961) and the affirmation of its availability for prisoners in *Cooper v. Pate*, 378 U. S. 546 (1964). See Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH L. REV. 175, 183-84 (1970).

The State's speculation that the parallelism of remedies results from uncertainty as to the availability of habeas corpus prior to the 1968 decision in *Carafas v. LaVallee*, 391 U. S. 234 (Br. 17) is

(Footnote continued on following page)

The State offers little discussion of the background and history of 28 U. S. C. § 2254(b), except for a brief reference to *Ex Parte Royall*, 117 U. S. 241 (1886). The fact is, however, that § 2254(b) has generally been construed to require exhaustion "to avoid upsetting state court *convictions*." Note, *Developments in the Law—Habeas Corpus*, 83 Harv. L. Rev. 1038, 1093 (1970), (emphasis added). See *Edwards v. Schmidt*, 321 F. Supp. 68, 71-75 (W. D. Wis. 1971) (detailed analysis of legislative and judicial history of § 2254(b)); *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Oswald v. Sostre*, 404 U. S. 1049 (1972). The language of § 2254(b) quite clearly reflects the special concern and delicacy of challenging "the *judgment* of a state court," not the discretionary decision of a prison officer.

That this special concern for interference with state court convictions underlay the exhaustion requirement, has been clear ever since *Ex Parte Royall, supra*, where exhaustion was first mandated. The explicit rationale of that decision was a concern for interference with the criminal court judgments of state *courts*, not merely state processes in general. Thus, Mr. Justice Harlan wrote:

> "The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred

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undermined by the following facts: (1) habeas corpus was known to be available in both federal and state courts long before 1968, see *Coffin v. Reichard, supra* and cases cited at Br. 32; (2) the largest number of § 1983 petitions were filed *after* 1968, see Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N. Y. U. L. Rev. 157, 171 n. 47 (1972); and (3) *Houghton v. Shafer, supra*, which rejected the exhaustion requirement in a prison-conditions case, was decided *after* the *Carafas* case.

upon it. That discretion should be exercised in the light of the relations existing, under our system of government, *between the judicial tribunals of the Union and of the States*, and in recognition of the fact that the public good requires that those relations be not disturbed by *unnecessary conflict between courts* equally bound to guard and protect rights secured by the Constitution." 117 U. S. at 251 (emphasis added).

This concern about federal interference with state court judgments of conviction and sentence has remained the dominant rationale throughout the subsequent 85 years, and, as the opinion in *Edwards v. Schmidt, supra*, indicates, underlay the codification in § 2254 (b). 321 F. Supp. at 74-75. For example, in *Fay v. Noia*, 372 U. S. 391, 419-20 (1963), the rationale of § 2254 (b) was described with the following quotation from *Darr v. Burford*, 339 U. S. 200, 204 (1950):

> "it would be unseemly in our dual system of government for a federal district court to upset a *state court conviction* without an opportunity to the state courts to correct a constitutional violation. . . . Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." 339 U. S. at 204 (emphasis added). See also *Ex Parte Hawk*, 321 U. S. 114, 116-117 (1944); *Baker v. Grice*, 169 U. S. 284, 291 (1891).

The point was made quite explicitly by Judge Parker in 1948 when the comity rule of *Ex Parte Royall* was codified. He stressed that the primary concern was "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction." *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 172-73 (1948). He pointed to the embarrassment of bringing

in judges as witnesses, and of a single federal judge reviewing the actions of the highest state tribunals. And in support of the position that there be no federal review so long as any state review was still possible (a position rejected in *Brown v. Allen*, 344 U. S. 443 (1953)) he emphasized:

> "the thing to keep in mind in the drafting of this section was to provide that review of *state court action* be had so far as possible only by the Supreme Court of the United States . . . not be had by the lower federal courts whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction." 8 F. R. D. at 176 (emphasis added).

For a careful analysis of the history and rationale of the exhaustion doctrine in a different context (pre-trial release) see Amsterdam, *Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal of Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 890-91, 902 (1965); see generally *id.* at 862-908.

The State's only effort at analysis of these historical and legislative purposes is to quote some of the general language from the above quotation from *Ex Parte Royall*, while ignoring the fact that the case involved an effort to interfere directly with a criminal prosecution already pending before a state *court*.

And in other contexts as well, concern about interference with the direct operation of state *courts* and their judgments, has characterized "our federalism" from the very beginning, as *Younger v. Harris*, 401 U. S. 37, 44 (1971) and 28 U. S. C. § 2283 indicate. And even in the latter instances, some interference is allowed where constitutional rights and § 1983 are concerned. See *Mitchum v. Foster*, 407 U. S. 225 (1972); *Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972).[4]

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[4] The common policies underlying 28 U. S. C. §§ 2283 and 2254(b) are noted in *Darr v. Burford*, 339 U. S. at 204 n. 10.

It is thus not surprising that virtually every court that has explicitly dealt with the problem at issue has ruled that § 1983 is available to prisoners who wish to challenge unconstitutional prison conditions, and that no exhaustion is required. *E.g., Wilwording v. Swenson, supra; Padilla v. Ackerman,* 460 F. 2d 477, 478-79 (9th Cir. 1972); *Sostre v. McGinnis,* 442 F. 2d at 182, *but cf.* 204 n. 50; *Edwards v. Lynch, supra; Landman v. Royster,* 333 F. Supp. 621, 650-51 (E. D. Va. 1971). And see *Humphrey v. Cady,* 405 U. S. 504, 516-17 n. 18 (1972) (on the authority of *Wilwording,* "some or all of petitioner's claims [attacking his commitment to a "sex-deviate facility"] may be entitled to be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required.") Even two of the Court of Appeals judges who disagreed with the ruling below considered that exhaustion of state remedies was unnecessary for a *damages claim* for wrongful solitary confinement in New York, since that state affords no damages remedy. *Ray v. Oswald,* ____ F. 2d ____, No. 72-1455 (Oct. 19, 1972) (Friendly and Lumbard, JJ.), ("in the absence of an adequate state administrative or judicial remedy, a federal court must hear a suit by a prisoner under section 1983"); *Jones v. Decker,* 436 F. 2d 954 (5th Cir. 1970) (a prisoner's suit for a declaratory judgment and damages relating to solitary confinement requires no exhaustion, though release from solitary does). Some of the dissenters below would also except "shocking" or "on going physical brutality" cases from exhaustion (App. 33a, 126a). The State however, would quite logically bar a federal damages action under § 1983 until *after* resort to the state courts on the merits of the claim (Br. 40).

Moreover, a host of cases in this Court and elsewhere have permitted prisoners to challenge the conditions of their custody under § 1983 without exhaustion of state rem-

edies, without discussing the habeas—§ 1983 classification problem. *E.g., Houghton v. Shafer*, 391 U. S. 639 (1968) (no exhaustion of administrative remedies and explicitly held that no exhaustion of *any* kind is required); *Haines v. Kerner*, 404 U. S. 249 (1972); *Cruz v. Beto*, 405 U. S. 319 (1972); *Younger v. Gilmore*, 404 U. S. 15 (1971); *Cruz v. Hauck*, 405 U. S. 59 (1971); *McDonald v. Board of Elections*, 394 U. S. 802 (1969); *Lee v. Washington*, 390 U. S. 333 (1968); *Cooper v. Pate*, 378 U. S. 546 (1964). This holds true even where release of some kind at some time is involved. See, *e.g., U. S. ex rel. Mosher v. McMann*, 460 F. 2d 126, 132 (2d Cir. 1972) (claim for loss of 616 days good time); *Carothers v. Follette*, 314 F. Supp. 1014 (S. D. N. Y. 1970); *Medlock v. Burke*, 285 F. Supp. 67, 69 (D. Wis. 1968); *cf. U. S. ex rel. Campbell v. Pate*, 401 F. 2d 55, 57 (7th Cir. 1969); *U. S. ex rel. Hancock v. Pate*, 223 F. Supp. 202 (N. D. Ill. 1968); *Nolan v. Scafati*, 430 F. 2d 548 (1st Cir. 1970); *Howard v. Smyth*, 365 F. 2d 428 (4th Cir. 1966); *Landman v. Peyton*, 370 F. 2d 135 (4th Cir. 1966 (release from solitary confinement); *cf. Jones v. Decker, supra.*

On the other hand, many of the cases cited by the State for the proposition that exhaustion is required, involve direct challenges to state *judicial* acts, not to conditions of confinement imposed by state prison officials; exhaustion where there is such direct conflict between federal courts and state courts may well be within the purpose of § 2254 (b). See, *e.g.*, the mental commitment cases, *Strowder v. Shevlin*, 380 F. 2d 370 (3d Cir. 1967), 368 F. 2d 954 (3d Cir. 1966); *U. S. ex rel. Schuster v. Herold*, 410 F. 2d 1071, 1083-89 (2d Cir. 1969) (Kaufman, J.). Only in the parole revocation area, where full release is directly and immediately at issue, have the courts often required exhaustion for claims against administrative actions, though usually without discussion. See *e. g., Morrissey v. Brewer*, 408 U. S.

471 (1972); *Morris v. Wingo*, 421 F. 2d 651 (6th Cir. 1970); *but see Edwards v. Schmidt*, 321 F. Supp. at 70 n. 71 (exhaustion not required for parole revocation). It does not appear, however, that the applicability of § 1983 to parole revocation or even to challenges to other types of state judicial action, has yet been explicitly discussed; since those problems are not involved herein, they need not be resolved at this time.

In sum, the State's claim is contrary to the rationale and history of § 2254(b) and to the overwhelming weight of authority. No case that has explicitly dealt with the issue at bar supports the State's position and there are many decisions to the contrary.

II. An exhaustion requirement will not substantially reduce federal-state friction or the federal court burden, and will not benefit the prisoner.

A. An exhaustion requirement will not reduce federal-state frictions.

The State's argument seems to be that the area of prison administration is unique, that state courts have a special role in relation to prison conditions, and that an exhaustion requirement will reduce federal-state frictions. None of these propositions is supportable.

1. Prison-condition cases do not raise "unique" problems for § 1983 jurisdiction.

In *Wilwording*, this Court stressed that "state prisoners are not held to any stricter standard of exhaustion than any other civil rights plaintiffs. Houghton v. Shafer, 392 U. S. 639." The Court thereby recognized the identity between challenges to prison conditions and challenges to other administrative decisions, and the difference between such

challenges and suits seeking to set aside state court criminal or other judgments on collateral attack. See Kaufman, J., concurring below (App. 120a-21a).

Despite *Wilwording*, the State claims that "the area of prison administration is unique" because of the pervasiveness of correctional officers' control and the "limitless" possibility for federal litigation (Br. 33-34). These very same contentions were presented to this Court in *Houghton v. Shafer, supra*, as arguments for administrative exhaustion: prisons are "unique" and allowing a federal court action will produce "multitudinous" suits. See Supp. Reply to Petition for Certiorari by Attorney General of Pennsylvania in *Houghton v. Shafer*, p. 5. These arguments were summarily rejected there, and should be similarly treated here.

Moreover, the very "uniqueness" claimed by the State cuts against intervention by state courts as much as by federal courts, for insofar as it exists, it results from the enormous discretion vested in the correctional *administrators* (Br. 33-34). It is this *administrative* interest which originally produced the "hands-off" doctrine in state courts, see Note, *Beyond the Ken of the Courts*, 72 Yale L. J. 506 (1962), which the Attorney General of Pennsylvania unsuccessfully argued in *Houghton v. Shafer, supra*, and which the State itself urged in the New York State courts in some of the very cases cited by them as indications of state interest.[5] As a matter of fact, this very type of alleged administrative complexity and "uniqueness' has been stead-

[5] For example, in *Brabson v. Wilkins*, 19 N. Y. 2d 433 (1967), the most recent prison conditions case cited by the State, prison officials urged the New York Court of Appeals to stay out of the prisons area and to maintain a "hands-off doctrine," citing *Childs v. Pegelow*, 321 F. 2d 487 (4th Cir. 1963), one of the leading "hands-off" cases. See Brief for Warden in New York Court of Appeals at p. 10. The same position was taken in other cases cited.

ily urged and uniformly rejected in many other areas of § 1983 jurisdiction besides prison conditions, such as education, see Brief for Respondents in *McNeese v. Board of Education*, 373 U. S. 668 (1968), at pp. 18-20, and housing, *Holmes v. N. Y. City Housing Authority*, 398 F. 2d 262, 266 (2d Cir. 1968).

And the truth is that prisons are not so "unique" that courts cannot exercise a meaningful influence. The handful of federal court decisions that have upheld challenges to prison conditions have already had a powerful and useful impact in improving matters, as enlightened administrators have realized. Maurice Sigler, Chairman of the United States Board of Parole and 1971-72 President of the American Correctional Association recently made exactly this point: "The effect of the courts' new interest in corrections has been beneficial." *A New Partnership in Corrections*, Address before 102nd Congress of the American Correctional Association, p. 5 (Aug. 21, 1972).[6] After all, the

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[6] A fuller excerpt of this portion of Mr. Sigler's address, which also reflects an awareness that prison administration is not unique, is as follows:

"Time is going a lot faster than it used to. I recall in my penitentiary days that nothing much changed from one day to another, from one year to another, or even one decade to another. But we are living in a time of accelerating change, and we in corrections have to take the ball and start running fast just to keep up and maybe pull a little ahead.

"Let me suggest some directions.

"First, we must change our attitudes toward the courts. The courts have not necessarily singled out corrections for attention and interference. In fact, for many years under the 'hands-off' doctrine, the courts left us alone entirely. Perhaps we failed to take advantage of it. What has happened more recently is only a sign of the times. The decisions of the courts are being felt in many facets of American life—in race relations, the environment, taxation, voting apportionment, and so on. It would be unrealistic for us to expect that we would continue to be exempted forever. Corrections is a public function and the attention of the courts is overdue. Frankly, judicial review will be with us from here on out.

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federal courts are not trying to "run" the prisons, or any other administrative process. They are merely beginning to insist on certain constitutional minima of decency and fairness which have heretofore been tragically absent from prisons, and which all other relevant agencies have ignored.

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"In committing offenders to us, the courts have assigned us the responsibility for their care and welfare. All of us have acknowledged that responsibility. It is inconsistent and ill-advised for us to fight every case that comes along involving the rights of our clients. After all, who is supposed to be most concerned about their welfare? Yet we have fought these cases repeatedly, all the way to the Supreme Court of the United States if possible.

"There have been enough cases now that we know the general direction and trend that further cases will follow. In the future, instead of resisting these cases—except perhaps for those which may be too absurd—we ought to anticipate them and take action to make litigation unnecessary.

"So far, we have been able to live with the rulings of the courts. They haven't brought about the disastrous consequences some of us predicted. Instead, the effect of the courts' new interest in corrections has been beneficial.

"For my own part, I must admit that in my day as a line officer I did not question the regulations and the restrictions on mail, visiting, access to the press, the courts, and attorneys. Those of you who have been in corrections for some time know, as I did, that you did not hold on to your job very long if you questioned the policies and orders that were formulated in the front office and handed down from one level of command to another. Or if you held on to your job, you might find yourself buried for years on the morning watch or in a tower. We were trained to do our jobs unquestioningly, and we had no choice.

"Today we are living in a different time. There are few facets of American life that are not undergoing reexamination and criticism. It is time to clear away traditional habits in corrections and take a hard second look at everything that we do. We are being weighed by a tough measure, and we must evaluate our policies and practices by harder and tougher standards of our own." (pp. 4-6) (emphasis added)

2. State courts do not have a special role in prison-condition suits.

For all these reasons, the state courts' interest in prisons is not significantly different from their interest in other § 1983 litigation. The state courts are certainly not more expert than the federal courts in handling constitutional questions; indeed, the opposite is generally true. *England v. La. St. Bd. of Med. Examiners*, 375 U. S. 411, 416-17 (1963); *Zwickler v. Koota*, 389 U. S. 241, 248 (1967). Allowing the state courts an opportunity to participate in developing federal law is certainly a useful goal, but this Court has never considered that a decisive consideration in any § 1983 case. See *England v. La. St. Bd. of Med. Examiners*, 375 U. S. at 416. Nor is the argument that state courts are physically closer than federal courts of constitutional significance—in some cases at least, *e.g.*, Auburn, New York, the federal court is but a few blocks from the prison. In any event, that is clearly a minor detail.

The State's attempt to manufacture a "particular relevance" for the role of the state courts "because the claims arise as a direct consequence of the process of state conviction and sentence" is equally strained. For one thing, the fact that the confinement results from a state court decision does not give that court a special competence or (unhappily) even interest in prison conditions. Most state courts lose jurisdiction over the prisoner shortly after sentence. See *ABA Minimum Standards Relating to Sentencing Alternatives and Procedures* 278 (1967). The long history of the "hands-off" doctrine which still prevails in many state courts indicates a deep and widespread unwillingness to become involved in such matters; the number of cases in which state courts have shown any interest in prison conditions is still almost negligible.[7]

[7] The experience in New York is discussed at pp. 33-35 below.

Moreover, such an argument may cover both too little and too much. The category covered by the "process of state conviction and sentence" is hardly a sharply defined one. Will it include suits for police abuse in the arrest process? *Cf. Monroe v. Pape, supra.* If it refers solely to events *after* conviction and sentence, is it intended to exclude conditions in pre-trial detention facilities, where all that has happened is arraignment, and in some cases, not even that? Will it also include suits for post-release disabilities, after the prisoner has served his sentence—although not a prison-conditions case, this certainly "arise[s] as a direct consequence of the process of state conviction and sentence." Will it include suits for damages for in-prison conditions after an inmate has already been released? In short, what aspect of the criminal process is included or excluded in this "process" involving a "particular relevance" for state courts?

Even those judges who accepted the State's contention below do not go as far as petitioners. Many prisoners file for damages under § 1983. Although the state casually dismisses these as unimportant and not "the real concern of virtually every prisoner action," the fact is that many prisoners do sue for damages. Where the acts complained of are past, or where there is a monetary loss such as the loss of property, *cf. Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972) that is the only remedy. Such damages may also be the most crucial factor in "the removal of the violation" (Br. 39). Injunctions are hard to supervise, and the deterrent effect of a damages action can be very great indeed. For this and other reasons, it has been found that many prisoners do in fact sue for damages.

In many states, however, including New York, prisoners have no damages remedy. See, *e.g., O'Brien v. McGinnis*, 311 N. Y. S. 2d 553 (S. Ct. Alb. 1970); *Hewson v. State of*

York, 27 A. D. 2d 358 (4th Dept.) *appeal dismissed*, 20 N. Y. 2d 758 (1967); Note, *The Collateral Consequences Of A Criminal Conviction*, 23 Vand. L. Rev. 929, 950-51, 1018-28 (1970). Because of this, the authors of two of the opinions deploring the decision below refused to require prior state recourse in damages actions. See *Ray v. Oswald*, *supra*. Yet, the logic of the State's theory, as duly and explicitly set forth in their brief, would require prior recourse to the state courts to determine the merits of the claim, after which the prisoner "may bring a civil rights action in federal court on his state court judgment" (Br. 40). And if the state court denies relief, that would probably bar the claim completely under *res judicata* principles; he would have no right to sue in federal habeas corpus since he would be seeking only damages.

Indeed, injecting the state courts into the process may well *increase* friction between the federal and state courts. As will be more fully explored below in the discussion of the burden on the federal courts, the result of the State's approach will be to produce single-judge federal review of a decision by the highest state court in virtually *every* prison-condition case that a prisoner loses in state court. At present, the review and direct conflict is solely between state administrator and federal court. But under the State's approach, the highest state courts must be brought into the process, and their conclusions of law (and sometimes their findings of fact) will always be reviewed by a federal judge, since *res judicata* does not apply to habeas corpus. Thus, the inter-court conflict that was formerly indirect at most, will become quite direct, and obviously without any compensating reduction of the friction presently resulting from federal judicial review of the prison administrators' action. This particular type of inter-court conflict is precisely the kind that put the severest strain on federal-state relations even with an exhaustion require-

ment. See remarks of Judge Parker, discussed at pp. 13-14 above.

As a recent commentator put it:

". . . [T]here is no sound policy reason for requiring the exhaustion of state judicial remedies. The choice is not between different types of adjudicatory proceedings, one of which may, as in the case of an administrative hearing, provide a more flexible and expert approach to the problem. Nor is it necessary that relief in federal court will disrupt a comprehensive state regulatory scheme. The question is simply whether one court or another is going to decide the case. Certainly the availability of alternative state and federal forums is no novelty to our federal system. There may, of course, be an extra burden imposed on the federal courts if litigants tend to choose the federal forum. But as long as a federal cause of action has been created and appropriate jurisdiction been conferred, it is not for a court to inquire into the burden which Congress has imposed.

"Of course Congress has the power to limit the cause of action or the jurisdiction of the federal court to cases in which an available state remedy has been exhausted. Whether Congress intended so to restrict section 1983 was one of the issues presented in *Monroe v. Pape*. The Court's apparent conclusion that section 1983 was not limited to cases where state judicial remedies had been exhausted is sound, particularly since where Congress has intended such a limitation, its intent has been expressed in clear language." Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201, 1205-06 (1968) (footnotes omitted).

A Harvard Law Review Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969) is critical of § 1983 actions, but would still allow immediate federal jurisdiction of the many prison cases which are proper class actions, 82 Harv. L. Rev. at 1494-96, 1509.[8]

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[8] It is not clear that habeas corpus cases can be brought as class actions. *Cf. Harris v. Nelson*, 394 U. S. 286 (1969); Note, *Multiparty Federal Habeas Corpus*, 81 Harv. L. Rev. 1482 (1968).

1. Exhaustion limited to release or good time cases produces irrational disparities.

The version of the State's argument accepted by the original Court of Appeals panels in *Rodriguez and Katzoff* and apparently by *Amicus* State of California raises even more problems than the broader position advanced here. The argument would require exhaustion where release from custody results from a successful challenge to the prison condition. But that draws lines at purely fortuitous points. If it refers to immediate rather than future release, it would make exhaustion turn on when the action is brought or decided, purely a fortuitous event. If it would reach future release, *i.e.*, all good time cases, it would make exhaustion turn on whether the case involved a challenge to a loss of good time for violating some rule as against an anticipatory, injunctive, declaratory judgment or damages challenge to the operation or enforcement of that same rule, again a fortuitous event. It might encourage prison officials to impose good time penalties even more than they do now, to avoid federal court review. Either version would exempt from the exhaustion requirement all damages actions, as well as all cases brought by prisoners who do not earn good time and therefore cannot lose it, *e.g.*, reformatory-sentenced prisoners in New York, see N. Y. Pen. L. §§ 75.00 and N. Y. Corr. L. §§ 803, 804, as well as challenges to some pre-trial detention facilities even though the very same issues may be involved, as in good time cases.

Indeed, the inconsistencies and incongruities of this more limited position indicate the problem clearly: we deal not with a situation that falls easily into a classification requiring prior state resort, such as a collateral attack on a state conviction but with conditions and official actions that

can arise in a multitude of settings. The essence of the situation is unconstitutional action by administrative officials, with a range of varied consequences and in a variety of settings. Some of these acts affect the length of custody, some lend themselves to damages, some involve challenges to judicial acts (though relatively few), some are appropriate for declaratory relief and some for injunctive relief. The state courts have no greater interest or competence in this area than in any other area of § 1983 jurisdiction; in some of these other areas, they have a more significant connection. See, *e.g., Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972) (garnishment which is usually related to court action, see dissent by White, J.). But even where such state court action is involved, federal court action under § 1983 is not to be displaced. See *Mitchum v. Foster*, 407 U. S. 225 especially 238-43 (1972) (importance of federal tribunals for the protection of civil rights regardless of the existence of state courts with coordinate responsibility). If effective enforcement of the congressional will reflected in § 1983 requires that it be construed as one of the express exceptions to 28 U. S. C. § 2283, even though proceedings are already pending in state courts, surely deference to state courts in § 1983 cases is less appropriate where no such proceedings are pending.[9]

[9] Although the State does not seek it here, the dissenters below urged a form of abstention. But that doctrine is clearly inappropriate, for it deals with a situation where prior recourse to the state courts is for purposes of resolving a question of *state* law which might obviate the federal question, not to give state courts a chance to construe federal law, as petitioners urge here. See, *e.g., Zwickler v. Koota*, 389 U. S. 241, 251 n. 14 (1967); *Lake Carriers Ass'n v. MacMullen*, 406 U. S. 498 (1972).

4. Exhaustion of administrative remedies is precluded by Houghton v. Shafer, supra, and is not raised by the cases at bar.

Exhaustion of administrative remedies was not argued below, nor even presented to the district court; it was explicitly rejected in *Houghton v. Shafer, supra,* when the same arguments were made for it as are made here. See p. 18 above.

In any event, these cases do not raise the issue: Katzoff did exhaust his administrative remedies, and in *Rodriguez* and *Kritsky,* any failure to exhaust state administrative remedies actually resulted from the failure of prison officials to present the matter to the chief administrative officer.

B. The federal courts' burden will not be appreciably lightened by exhaustion.

The State points to the great increase in prisoners' § 1983 petitions and urges that exhaustion will reduce it. But this is a *non sequitur,* for requiring prior recourse will not appreciably lighten the load. The State also condemns these petitions as involving "petty disputes," (Br. 34) which sounded a sympathetic chord with the dissenters and others below. Sadly, however, all too many of these claims do have some merit, as virtually all members of the entire Court of Appeals have recognized from time to time.

1. Exhaustion cannot substantially reduce the federal court case load.

There is no question that the number of prison-conditions cases have risen drastically. There is much dispute, however, as to how heavy a burden this does in fact impose, as Judges Kaufman, Feinberg and Oakes noted below. It has been found, contrary to the fears of both the State and the dissenting judges below, that there have been virtually no

hearings on the *pro se* complaints.[10] Discovery has not been utilized to harass and has, in fact, rarely been used. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 43 N. Y. U. L. Rev. 159, 170 (1972). Transport of prisoners is almost never done in a *pro se* case, *id.* at 218, and is quite infrequent even in cases involving counsel. When transport has been required, there has been no problem in obtaining state cooperation, despite Judge Mansfield's fears, App. 123a. See Foley, J., in *Wright v. McMann*, 321 F. Supp. 127, 134-35 (N. D. N. Y. 1970), *aff'd in part, rev'd in part*, 460 F.2d 126 (2d Cir. 1972). If prisoners have in fact been filing federal cases in order to get a vacation or "change of scenery" (App. 123a), then they have surely learned by now that this is not a very hopeful gambit.

Furthermore, exhaustion will not lighten the load but merely shift it a bit in time: every state court challenge that is unsuccessful will be followed by a federal court challenge in habeas corpus, unless the prisoner is released, in which case he may sue for damages. And if damages actions are excluded from the exhaustion requirement, as the Court of Appeals below did, see *Ray v. Oswald*, *supra*, exhaustion won't even do that—prisoners will quickly learn to add a damages count, and thereby avoid the exhaustion requirement. On the other hand, if the State's approach to damages is adopted, there will still be a separate federal suit in all successful state challenges.

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[10] Correspondence with United States District Judges John T. Curtin and Edmund Port, of the Western and Northern Districts of New York respectively (the two busiest district courts for prisoners' cases) indicates that in 1971-72, Judge Curtin held "no evidentiary hearings . . . in actions initiated by *pro se* prisoners' applications," and "one evidentiary hearing . . . in each of two cases brought by prisoners who were already represented by retained counsel." Judge Port recalled "that there would not be more than two cases coming within the categories" described above. Letters to counsel from Judges Curtin and Port, both dated Nov. 21, 1972.

That the federal court burden will not be substantially reduced can be seen from the experience with habeas corpus applications. *Despite the exhaustion requirement*, the number rose sharpely during the 1950's and 1960's. See generally Note, *The Burden of Federal Habeas Corpus Petitions from State Prisoners*, 52 Va. L. Rev. 486 (1966); Note, 83 Harv. L. Rev. at 1041-42; Zeigler & Hermann, 43 N. Y. U. L. Rev. at 169-73.[11]

The fact is that the current volume of prisoner petitions results not from the failure to require exhaustion but from the federal courts' occasional willingness to grant relief against gross affronts to human decency. See, *e.g.*, *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), *on remand*, 460 F.2d 126 (2d Cir. 1972). Despite the occasional and isolated exceptions, state courts are still unwilling to consider these cases on the merits, and it is not for lack of opportunity.[12] See Goldfarb & Singer, 39 Geo. Wash. L. Rev. at 182-84.

2. A significant number of prisoners rights claims are meritorious.

Nor are these cases "petty disputes." As the many decisions throughout the nation and in this Court have shown, a significant number of these cases raise extremely grave

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[11] Prisoners' action under § 1983 are not the only cases to increase dramatically in recent years. There have also been sharp increases in Securities Exchange and Commodities Act case, N. A. R. A. proceedings (narcotics addiction) and federal criminal cases. See Report of the Administrative Office of the United States Courts 108 (1970). Unlike prisoners' cases, these others generally involve full-dress proceedings, and are not disposed of summarily.

[12] It is difficult to see how petitioners can complain about the alleged failure of state prisoners to invoke N. Y. Civ. Rts. L. § 79-c (Br. 30). As petitioners' themselves indicate (Br. 46), state prisoners have turned to the state courts for relief, regardless of whether they knew enough to formally style the case as arising under § 79-c. Their lack of success, no matter what the form of action, is shown at pp. 33-35.

issues, even though most are dismissed summarily. For example, it would seem difficult to argue that Katzoff's complaint about 60 days in solitary and loss of 60 days good time for merely writing some comments in a private uncirculated diary is either "trivial" or "groundless"; the *Rodrigues* and *Kritsky* claims were both sustained on the merits after a full hearing. Many other prison claims have recently been pressed successfully, despite the federal judiciary's frequently expressed reluctance to interfere in the administration of state prisons. The recent tragic events at Attica, the Tombs and elsewhere, where prisoners made demands recognized by all including the administrators as at least reasonable, show the depth of the problem. See Report of New York State Special Commission on Attica 2-102 (1972); *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Sostre v. McGinnis*, 442 F.2d at 190-91, 205. Perhaps some or many of these complaints do not rise to constitutional status for purposes of 42 U. S. C. § 1983, see *e.g.*, *Church v. Hegstrom*, 416 F.2d 449 (2d Cir. 1969), but that can only be decided on a case-by-case basis. See, *e.g.*, *Sostre v. McGinnis*, 442 F.2d at 194 n. 28, 201 ("We leave a more precise delination of the boundaries . . . [re mail] for future cases"); 206 n. 2 (Waterman, J., concurring.[18]

In any event, the very same concern about a plethora of groundless claims was expressed by the dissent in *Monroe v. Pape*, 365 U. S. 167, 240 n. 68 (1961), but all other members of the Supreme Court rejected this argument; they

[18] Judge Hays, one of the dissenters below and the author of the panel opinions in *Katzoff* and *Rodrigues*, would create an exception to the exhaustion requirement for "shocking" and "extreme cases" (App. 32a-33a). Such a category, however, is as likely to defy principled and meaningful definition as the same test in the Fourth Amendment area. See *Rochin v. California*, 343 U. S. 165 (1952).

also implicitly rejected the great concern for localism expressed by the dissent. *Id.* at 243. As was indicated by a judge with much experience in prison cases, the problem may really be one of adequate legal help to filter out the baseless, repetitious, incoherent and generally worthless claims, while leaving the meritorious ones. *U. S. ex rel. Stevenson v. Mancusi*, 325 F. Supp. 1028, 1031 (W. D. N. Y. 1971) (Curtin, J.). See also Zeigler & Hermann, 43 N. Y. U. L. Rev. at 206-07. And as litigation begins to accomplish whatever it is that litigation can do, and as the legal principles are established, the number of filings may well decline as the habeas applications have begun to.

If prisoners do bring frivolous or groundless claims, the proper way to handle these is to dismiss on the merits, as courts are doing today, see Zeigler & Hermann, 43 N. Y. U. L. Rev. at 201, not to close the jurisdictional door completely to meritorious claims. If the burden of such claims is too great, then it is up to the Congress to provide more resources or to restrict the jurisdiction. But that is a legislative, not a judicial matter.

C. The prisoner will not benefit from an exhaustion requirement.

It is hard to take seriously the State's claim that prisoners will be better off by being required to spend several years exhausting state administrative and judicial remedies before being allowed a federal forum in which to avail themselves of the "swift" and "flexible" habeas corpus remedy. Certainly if the State's complaint that state prisoners are not availing themselves sufficiently of available state remedies is at all sound, but see p. 29 n. 11 above, it indicates that prisoners at least think they are better off with a federal forum.

The State's reasons for advising prisoners that they would be better off with habeas corpus than with § 1983, despite having to exhaust all possible state remedies, verge on the ludicrous. Habeas corpus is not as swift as the State claims, see Zeigler & Hermann, *id* at 199-200 (average time for disposition in sample studied was approximately four months) and § 1983 cases can be and are usually handled just as "flexibly." *Id.* at 210-05, 211-16. The fear of a "plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure" (Br. 37) is baseless—as noted above, discovery is rarely utilized except where the action is brought by counsel (and few are), and some of this discovery is probably available in habeas corpus anyway, though generally only after a court order. See *Harris v. Nelson*, 394 U. S. 286 (1969). Moreover, there are many uncertainties about habeas corpus which would have to be resolved—is a class action, often an indispensable aspect of a prison-conditions case, available in habeas corpus? Will it be necessary to bring a separate action for damages? Should the state court's findings be given the same deference as in collateral attacks?

And the prisoner will be still worse off if the state does not permit damages since he will be forced into a multitude of lawsuits almost as a matter of course, even if he wins in the state courts.

All this is to say nothing of the worst aspect of all—the great delay in access to the federal forum when, as the legislative history and hard facts of current history make clear, he is likely to be unsuccessful in state courts. No matter how difficult it is for federal courts openly to acknowledge it, state courts are still not very sympathetic to prisoners' cases. Admittedly, state courts have as great an obligation as the federal tribunals to uphold and apply

the Constitution, but both the Founders of this nation and subsequent Congresses and courts have recognized the special competence and concern of federal courts in this area, and the problems in relying on state courts. For one thing, many state courts are unfamiliar with the problems, especially those in the rural areas in which prisons are located, where there is less federal question business. And as noted, they may be highly unsympathetic. See generally Madison's remarks about the dangers of prior recourse to state tribunals in I Farrand, *The Records of the Federal Convention of 1787* at 124 (1937). See also *The Federalist* No. 80 *passim; The Federalist* No. 81, at 528 (Mod. Lib. ed. 1941); see also the legislative history of the Civil Rights Act in *Monroe v. Pape, supra;* Amsterdam, 113 U. Pa. L. Rev. at 801-02, 835-36 Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 Harv. L. Rev. 1352, 1358-60 (1970).

A glance at state treatment of prisoners' cases demonstrates that regardless of any specific law on the books, such as the 1969 N. Y. Civil Rights Law § 79-c allowing injunctive relief against constitutional violations, state courts continue to adopt a "hands-off" approach. Without seeking them, counsel last year received at least five New York state court orders in cases challenging a wide variety of prison conditions at Auburn prison in 1971. These included one Article 78 proceeding, several "mandamus" claims and a habeas corpus petition, all challenging the denial of good time on various constitutional grounds. The claims included violations of constitutional safeguards in disciplinary proceedings, conditions in segregation, access to law books, denial of medical care, interference with mail, loss of personal and legal property and other claims almost all of which have received at least careful consideration in

federal courts, and some that have been sustained. (Indeed, some complaints relied on the district court opinions in *Sostre v. McGinnis, supra* and in *Wright v. McMann, supra.*)

In each of these five cases, the action was dismissed in virtually identical language, as follows:

> "The respondent [prison superintendent], not the court, is charged with institutional discipline and administration. Furthermore, the petition fails to comply with CPLR 7002 (c) 1."[14] *Cammack v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. 12/23/70); *People ex rel. George Rudder v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay, Dec. 29, 1970); *People ex rel. Diaz v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970); *People ex rel. Cunningham v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970).

In a later decision it was put similarly:

> "The withholding of good time for an inmate is a matter concerning the administration and discipline of the Facility, and as such is within the jurisdiction of the respondent [prison superintendent], not the Court." *Jones v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. 2/9/71).

Even if an appeal were successful, it would take many months, with further appeals by the State inevitable in the unlikely event petitioners might prevail at any point.

Nor is this an isolated attitude. See *People ex rel. Cataliotti v. Lavallee,* ____ Misc. 2d ____ (Sup. Ct. Clin. 1969) (Main, J.); *Bloeth v. Cyrta,* 39 Misc. 2d 1039, 242 N. Y. S. 2d 307 (Sup. Ct. Suff. 1963). Indeed, only a few reported cases show any interest in the problem. Compare *Brabson v. Wilkins,* 19 N. Y. 2d 449 (1971) (4-3) and

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[14] New York CPLR 7002(c)1 requires an affidavit setting forth the name of the custodian and other purely formal matters relating to the detention.

People ex rel. Menechino v. Warden, 27 N. Y. 2d 449 (1971) with *e.g.*, *Catanzaro v. Martin*, 238 A. D. 914, 130 N. Y. S. 2d 200 (4th Cir. 1954) and *People ex rel. Scarola v. Jackson*, 276 A. D. 939, 94 N. Y. S. 2d 251 (3d Dept. 1950). One area in which state courts have shown some interest recently is in religious practices, and even there, the rulings are inconclusive, *Blazic v. Fay*, 21 A. D. 2d 817 (2d Dept. 1964); *Casey v. Fay*, 22 A. D. 2d 941 (2d Dept. 1964).

These decisions illustrate the scope of the problem. And there are probably many more like them throughout the United States unknown to counsel, since such decisions are rarely reported. As the Founding Fathers, subsequent Congresses and Supreme Court decisions all recognize, state remedies are simply inadequate where controversial federal rights are concerned. To force prisoners to resort to them is thus effectively to deny them their day in court—*any* court.

There are of course isolated examples to the contrary. But they are still all too rare.

In view of these facts of life, to require exhaustion is to run the risk that because of the time lag, prisoners may lose the federal forum entirely. This is not because the state courts do not act expeditiously (Br. 43-44), but because of the need to go through the entire hierarchy of state administrative and judicial proceedings, including all appeals.

The State contends that the logical implication of respondents' position is that exhaustion would not be required even for collateral attack if the sentence is short enough (Br. 45). Perhaps, and that is some authority for that position. *Ex Parte Kieffer*, 40 Fed. 399 (C. C. D. Kan. 1889) (petty offense); *U. S. ex rel. DeVita v. McCorkle*, 216 F. 2d 734, 744 (3d Cir. 1954); *Thomas v. Teets*,

205 F. 2d 236, 240 (9th Cir.) *cert. denied*, 346 U. S. 910 (1953) (death penalty); Note, 83 Harv. L. Rev. at 1100; Amsterdam, 113 U. Pa. L. Rev. at 893-94. But collateral attack on a state court judgment raises such different considerations, that one may continue to require exhaustion even in cases where the sentences are very short, while avoiding loss of a federal forum where those considerations are not present.

The State also seems to complain that the state prisoner is presently better off than the federal prisoner who, according to the State, is restricted to habeas corpus. It is now clear, however, that federal prisoners have remedies other than habeas, such as mandamus, 28 U. S. C. § 1651, and the like. See *Mead v. Parker*, 464 F. 2d 1108 (9th Cir. 1972). Also, habeas corpus for federal prisoners does not involve postponing and perhaps losing a federal forum for a federal claim. Administrative exhaustion is indeed required, but that is because the special reasons for refusing to require administrative exhaustion in § 1983 do not apply; in any event, it is not the habeas remedy that requires the administrative exhaustion, but other considerations that are not present in the state situation and apply even where a federal prisoner does not use the habeas route.

The fact is that the State wants to make state prisoners who challenge prison conditions much worse off than either federal prisoners, other § 1983 claimants, or those who attack their convictions: only those who attack in-prison conditions will be required to exhaust not merely state judicial remedies, like other state habeas petitions, but also state administrative remedies. No other class is so disadvantaged yet few others are more in need of protection.

As noted above at p. 30 n. 13 some of the dissenters would dispense with exhaustion where truly "shocking" conditions are concerned. See App. 33a. But how can the prisoner know what a judge will find "shocking"? If he thinks those "shocking" conditions exist — and he usually will — he will routinely file in federal court. If he is wrong, he will then have to go into state court and then later back to federal court.[18]

Conclusion

For almost a century and a half, our prisons have been a national disgrace. Waves of prison reform have come and gone, but to no avail. The Chief Justice has described prison systems as "the most neglected, the most crucial and probably the least understood phase of the administration of justice," wherein inmates are treated like "rubbish." Address by Chief Justice Burger, Centennial Convention of the Ass'n of the Bar of the City of New York, Feb. 17, 1970, in 25 Record of N. Y. C. B. A. 14, 15 (Supp. March 1970). President Nixon has recently decried the "appalling deficiencies of our prisons and rehabilitation efforts" and stated that the prison system "presents a convincing case of failure." Memorandum from the President of the United States to the Attorney General of the United States, Nov. 13, 1969, quoted in Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. Cin. L. Rev. 650, 651 (1970). See also Burger, *No Man Is an Island*, 56 A. B. A. J. 325 (1970).

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[18] An example of how long it can take state courts to handle a problem after a federal court ordered abstention in 1964, *Sostre v. McGinnis*, 334 F. 2d 906 (2d Cir. 1964), can be found in *SaMarion v. McGinnis*, 35 A. D. 2d 684, 314 N. Y. S. 2d 715 (4th Dept. 1970).

Only recently, have hopes begun to stir. Part of the reason has been the actions of the federal courts, and, as noted, enlightened administrators have not rejected such action. See Sigler, *supra*. And some changes have resulted.

Those changes are what is really at stake in this proceeding. The State is not arguing on behalf of the state courts' prior scrutiny but really against any meaningful scrutiny at all. Their arguments in other cases, the lack of any real change in *e.g.*, New York, except occasionally in response to court suits, all demonstrate this. Respondents do not wish to denigrate the state courts, but the framers of the Civil Rights Act knew very well that it is the *federal* judiciary that is our primary protector against arbitrary and unconstitutional state action. See *Mitchum v. Foster*, *supra*. The federal judge's detachment, life tenure, and familiarity with constitutional questions, all conjoin to make meaningful protection a real possibility. Regardless of isolated exceptions, prisoners and petitioners know that what is at stake is not merely the possibility of federal judicial review but the possibility of any meaningful judicial review whatsoever.

Obviously, there are difficulties and frictions; at times there will be problems with classifications though the line drawn by Judges Kaufman and Doyle limiting the exhaustion requirement to collateral attacks on convictions, would seem to be clear and sharp. But a society faced with so troubled an institution as our prisons, will never be able to deal with it without some frictions and difficulties.

If our prisons are to be restored to decency, the federal courts must be allowed to continue the role they have begun to play. The alternative would announce to the world, to the prisoners, and to the administrators, that state

prisoners are not entitled to the Constitution. Such an announcement may not only halt the impetus for improvement but may actually reverse the process.

In *Humphrey v. Cady*, and in *Wilwording v. Swenson*, this Court declared that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U. S. at 251-252. The State would have this Court repudiate that position, despite the absence of either precedent or sound policy.

The decision below should be affirmed.

Respectfully submitted,

HERMAN SCHWARTZ,
EDWARD I. KOREN,
LEE MICHAELS,
New York Civil Liberties Union,
77 West Eagle Street,
Buffalo, New York 14202,

Attorneys for Respondent Michael Katzoff.

JACK GREENBERG,
STANLEY A. BASS,
Room 2030,
10 Columbus Circle,
New York, New York 10019.

RICHARD A. KOHN,
100 State Street,
Albany, New York 12207,

Attorneys for Respondents Eugene Rodriguez and John Kritsky.

MELVIN L. WULF,
American Civil Liberties Union Foundation,
22 East 40th Street,
New York, New York 10016.